

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARGARITA GUTIERREZ

Claimant

VS.

CREEKSTONE FARMS PREMIUM BEEF

Respondent

AND

COMMERCE & INDUSTRY INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,026,277

ORDER

Claimant appealed the April 5, 2007, Award entered by Administrative Law Judge John D. Clark. The Workers Compensation Board heard oral argument on July 25, 2007.

APPEARANCES

Conn Felix Sanchez of Kansas City, Kansas, appeared for claimant. Katie M. Black of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

There is no dispute claimant injured her left shoulder working for respondent. And there is no dispute claimant's injury occurred due to repetitive trauma and that the date of accident for this series of repetitive traumas is October 11, 2005. The primary issue before Judge Clark was whether claimant also sustained a rateable permanent impairment to her neck.

In the April 5, 2007, Award, Judge Clark determined claimant sustained a three percent impairment to her left upper extremity only. In reaching that decision, the Judge

was persuaded by the opinions of Dr. Paul S. Stein, who examined and evaluated claimant at the Judge's request.

The only issue on this appeal is the nature and extent of claimant's injury and permanent impairment.

Claimant argues Dr. Stein did not follow the fourth edition of the AMA *Guides*¹ in evaluating claimant's permanent impairment. In short, claimant contends Dr. Stein's findings are both contradictory and not supported by the *Guides*. Moreover, claimant argues Dr. Stein's evaluation was questionable as he did not note whether claimant had an interpreter and the doctor did not keep a copy of the medical records that he allegedly reviewed in evaluating claimant. Accordingly, claimant contends Dr. Stein's opinions should not be considered and, therefore, the Board should adopt Dr. Michael H. Munhall's opinion that claimant has sustained an 18 percent whole person impairment from injuries to both her left shoulder and neck.

Conversely, respondent argues the April 5, 2007, Award should be affirmed. Respondent argues Dr. Stein's opinions regarding claimant's functional impairment are credible as he is an experienced board-certified neurosurgeon who was selected by the Judge to evaluate claimant's injuries, but Dr. Munhall's opinions are not credible because the doctor regularly evaluates injured workers for their attorneys.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

Claimant works for respondent, a meat processing plant, as a trimmer. She holds a hook in her left hand and a knife in her right hand. The work is intensively repetitive. The parties stipulated that through October 11, 2005, claimant sustained personal injury by accident that arose out of and in the course of her employment with respondent.

Claimant initially began experiencing symptoms in her left shoulder and neck. Medical records introduced into evidence indicate those symptoms began in August 2005. When claimant reported her symptoms to respondent, the company referred her for medical treatment. In October 2005, claimant received physical therapy for her neck and left shoulder. And in November 2005, claimant met with orthopedic surgeon Dr. Bernard Hearon, who recommended a left shoulder diagnostic arthroscopy for a potential rotator cuff tear. But claimant has declined surgery to date as she wants a guarantee of its success.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

When claimant testified at her January 2007 regular hearing, she had also been experiencing right shoulder symptoms for approximately two months. Claimant attributed those symptoms to “using the wrong hand.”² Nonetheless, claimant had not sought any treatment for the right shoulder symptoms.

Despite her ongoing symptoms, claimant continues to work for respondent. Consequently, at this juncture claimant requests permanent disability benefits based upon her functional impairment rating.

At her attorney’s request, claimant was evaluated by Dr. Michael H. Munhall, who is board-certified in physical medicine and rehabilitation. Dr. Munhall examined claimant in February 2006 and rated her as having a five percent whole person functional impairment for residual neck pain, a 14 percent left upper extremity impairment for range of motion deficits in the shoulder, and a 10 percent left upper extremity impairment for residual left shoulder weakness. Combining those left upper extremity impairments, the doctor found claimant had a 14 percent whole person impairment. And when Dr. Munhall combined the impairment for the left upper extremity with the impairment for the neck, the doctor concluded claimant had sustained an 18 percent whole person impairment due to the left shoulder and neck injuries she allegedly sustained working for respondent.

Dr. Munhall believed claimant’s neck injury fell within the DRE (Diagnosis-Related Estimates) Cervicothoracic Category II of the *Guides* because claimant had consistent neck pain over many months and loss of range of motion. But the doctor did not find any neurological impairment, which might have placed claimant in a different DRE category.

Judge Clark appointed Dr. Paul S. Stein to evaluate claimant for purposes of this claim. Dr. Stein, who is a board-certified neurological surgeon, examined claimant in early June 2006. Although Dr. Stein found claimant’s cervical range of motion was full, the doctor noted it took some effort and caused some complaints of discomfort. Nonetheless, the doctor found claimant’s cervical range of motion “was relatively full and consistent with her age.”³ Dr. Stein also found claimant had some tenderness to deep palpation in the upper thoracic and the lower cervical midline, which extended into the left trapezius. Nevertheless, the doctor did not believe claimant had sustained any functional impairment to her neck or cervical spine. The doctor testified, in pertinent part:

Cervical range of motion today was relatively full and consistent with her age, although accompanied by complaints of pain. Physical therapy measurements in October of 2005 were also consistent with a full range of cervical movements. There

² R.H. Trans. at 7.

³ Stein Depo., Ex. 2 at 4.

is no muscular spasm. *Although this individual may have some element of soft tissue discomfort in the neck as a result of her work activity, there is insufficient finding to determine the presence of permanent functional impairment in this area.* She is in DRE cervicothoracic Category I as found on page 103 of the AMA Guides to the Evaluation of Permanent Impairment Fourth Edition. This carries no permanent impairment.⁴

Dr. Stein also concluded claimant had sustained a repetitive trauma injury to the left shoulder. The doctor recommended a left shoulder MRI and arthrogram and, depending upon the results of those studies, possible referral for surgery to address shoulder impingement. Assuming she had no additional shoulder treatment, Dr. Stein estimated claimant had a three percent (two percent for decreased flexion and one percent for decreased abduction) left upper extremity impairment as measured by the fourth edition of the AMA Guides. Unlike Dr. Munhall, Dr. Stein did not provide a rating for shoulder weakness because he did not find true weakness as claimant failed to give full effort due to pain.

Claimant has lived in the United States since 1986 and she primarily speaks Spanish. But Dr. Stein's medical report did not indicate, and the doctor could not remember, whether claimant had an interpreter at her examination. The doctor, however, noted in his report that his communication with claimant was adequate.

The issue presented to Judge Clark was whether Dr. Stein's opinions or Dr. Munhall's opinions were the more persuasive. The Judge chose Dr. Stein, whom the Judge selected to provide an independent opinion. In theory, a doctor chosen by an administrative law judge provides an unbiased evaluation and opinion. Such doctor has no apparent interest in the litigation and, therefore, should not be influenced by either party. Claimant's contention that Dr. Stein's examination and evaluation was deficient is not supported by the record.

Not all injuries comprise a functional impairment under the fourth edition of the Guides, which we are compelled to use under the Workers Compensation Act.⁵ Considering the entire record, the Board likewise finds that Dr. Stein's opinions, in this instance, are more persuasive than those of Dr. Munhall's. Consequently, the Board finds it is more probably true than not that claimant does not have a permanent impairment to her neck as measured by the AMA Guides and, therefore, the April 5, 2007, Award should be affirmed.

⁴ Stein Depo. at 11 (emphasis added).

⁵ See K.S.A. 44-510d and K.S.A. 44-510e.

The Board adopts Judge Clark's findings and conclusions that are not inconsistent with the above.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁶ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the April 5, 2007, Award entered by Judge Clark.

The record does not contain a written fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

IT IS SO ORDERED.

Dated this ____ day of August, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
Katie M. Black, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

⁶ K.S.A. 2006 Supp. 44-555c(k).